

## AFTER *CITIZENS UNITED*

MICHAEL S. KANG\*

### INTRODUCTION

*Citizens United v. FEC*<sup>1</sup> may prove to be the most important campaign finance decision in decades as a critical step in a transformation of campaign finance law under the Roberts Court. The decision explicitly overruled longstanding Court precedent and struck down as unconstitutional federal prohibitions on the use of corporate treasury funds for campaign finance expenditures in connection with federal elections.<sup>2</sup> In short, federal law that blocked corporations from spending treasury funds on federal campaign speech was struck down, and by extension, similar state laws modeled after federal law also were struck down as they applied to state and local elections.<sup>3</sup> Although the immediate public reaction focused on the potential for increased corporate spending in elections, the much larger importance of the case is the signal from the Court about the direction of campaign finance law going forward.

The doctrinal payoff of *Citizens United* is a substantial narrowing of the government interest in campaign finance regulation. The permissible grounds for campaign finance regulation had subtly expanded under the Rehnquist Court, which consistently deferred to the government and upheld a variety of campaign finance regulations.<sup>4</sup> *Citizens United*, reflecting Justice Kennedy's views previously expressed mainly in dissent, represents the Roberts Court's clear reversal of that trend and a narrow focus on quid pro quo corruption as the exclusive grounds for government regulation.<sup>5</sup>

Although much of the immediate reaction to *Citizens United* focused on the decision's short-term impact on political spending, the doctrinal impact of the decision is likely to be more significant. There were several cases rising up through the lower courts whose complexions were transformed by *Citizens United* and the ascendance of Justice Kennedy's views on campaign finance law.<sup>6</sup> Although the degree to which the Roberts Court will extend the basic logic of Justice Kennedy's majority opinion in *Citizens United* is of course uncertain, the

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\* Associate Professor, Emory University School of Law. Many thanks to Bobby Ahdieh, Rick Garnett, Allison Hayward, Craig Holman, Lloyd Mayer, Mike Pitts, and Robert Schapiro for their comments on earlier drafts.

1. 130 S. Ct. 876 (2010).

2. *Id.* at 913.

3. *See id.*

4. *See, e.g.,* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 130 S. Ct. 876; Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000); Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

5. *Citizens United*, 130 U.S. at 908.

6. Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 699 (9th Cir. 2010); SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 689 (D.C. Cir. 2010), *petition for cert. filed*; Emily's List v. Fed. Election Comm'n, 581 F.3d 1, 8 (D.C. Cir. 2009).

application of *Citizens United* to these cases could transform campaign finance law as it has stood for decades.

In Part I, I explain that *Citizens United* itself is markedly detached from political reality. *Citizens United* reinforces and depends upon the greatest absurdity of campaign finance law—that independent expenditures pose no threat of campaign finance corruption. In Part II, I explore the doctrinal consequences of *Citizens United* for the future of campaign finance law. I explain that if extended to its logical extremes, *Citizens United* undercuts the constitutionality of much campaign finance regulation. As a result, *Citizens United* is an important signal of the Roberts Court’s direction in this area and may be a turning point in the development of campaign finance law.

### I. THE MEANING OF *CITIZENS UNITED*

*Citizens United* struck down as unconstitutional federal prohibitions on corporate expenditures in connection with federal elections.<sup>7</sup> The case arose when Citizens United, a small corporation with a budget of \$12 million, funded a ninety-minute documentary about then-Senator Hillary Clinton, who was a candidate for the Democratic presidential nomination in 2008.<sup>8</sup> Citizens United sought to release the documentary on cable video-on-demand, as well as broadcast television advertisements for the documentary, within thirty days of the 2008 primary elections. However, as a corporation, Citizens United was prohibited under federal law<sup>9</sup> from publicly distributing what amounted to electioneering communications in the form of the documentary and advertisements.<sup>10</sup> Citizens United initially challenged the federal prohibitions on several grounds, including the claim that cable video-on-demand did not constitute a prohibited public distribution, but it did not press the Court on the facial constitutionality of the federal prohibition on corporate electioneering. After oral argument, though, the Court surprised nearly everyone by ordering rebriefing and reargument on this larger question.<sup>11</sup> Only after a second briefing and argument, the Court decided in *Citizens United* that there was no constitutional basis for “allowing the [g]overnment to limit corporate independent expenditures.”<sup>12</sup>

The majority opinion in *Citizens United* framed the basic issue of the case as whether “the [g]overnment may impose restrictions on certain disfavored speakers”<sup>13</sup>—namely, corporations—but in so doing, the Court asked the wrong

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7. *Citizens United*, 130 S. Ct. at 913.

8. *Id.* at 887.

9. 2 U.S.C. § 441b(b)(2) (2006), *invalidated by Citizens United*, 130 S. Ct. at 913.

10. *Id.* § 434(f)(3) (defining “electioneering communication” as any “broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for [f]ederal office” made proximate to an election, targeted to the relevant electorate).

11. *Citizens United*, 130 S. Ct. at 888.

12. *Id.* at 913.

13. *Id.* at 899.

set of questions. Corporations are not the relevant actors whose rights we ought to be concerned about protecting. Corporations are not people, nor are they entitled to all the constitutional rights of individual citizens. But as many supporters of *Citizens United* correctly argue, we nonetheless invest institutions such as corporations and political parties with constitutional entitlements when it appropriately serves the rights of individuals who constitute those institutions. And yes, corporate expenditures would be a more efficient way for shareholders to convert treasury funds into political speech. However, all campaign finance regulation complicates the ability of shareholders and other individuals to direct funds to political speech. In other words, the fact that a government restriction makes shareholder speech more difficult is obviously insufficient by itself to justify a constitutional prohibition of that restriction—we need to know much more about how shareholders’ expressive interests are compromised, if at all, to a degree that requires the Court to intervene.

It is unclear how shareholders are inappropriately disadvantaged by prohibitions on corporate expenditures struck down in *Citizens United*. Shareholders are not disadvantaged by their decision to incorporate, because they always remain free to make independent expenditures on an unlimited basis in their individual capacity, just like non-shareholders and everyone else. The analysis might be different if shareholders were in a worse position than non-shareholders, but they are not. Just as non-shareholders can aggregate funds through a political action committee (PAC) or political party, so too can shareholders. Perhaps the government should allow corporate expenditures and simply expect non-shareholders to incorporate as well, but whether the Constitution prohibits the government from refusing to do so is a different matter.

What functional difference does *Citizens United* achieve by permitting corporations to spend treasury funds on independent expenditures? A key difference is that shareholders obtain the advantage of streamlined aggregation through the corporation, as opposed to other entities. For non-shareholders to aggregate their money, they must pool funds, subject to personal income tax, by contributing individually to a PAC or political party. The PAC or party collects their pooled money, but it does so only subject to applicable restrictions on contributions under campaign finance law. By contrast, the post-*Citizens United* corporation may serve as both a source of funds and the pooling entity for those funds all at once for its shareholders. It can pool shareholder money simply by retaining earnings, instead of distributing dividends to shareholders who would then need to aggregate those funds through a separate entity. This streamlined aggregation not only lowers transaction costs, but also uses pre-tax dollars (for purposes of personal income tax) and bypasses restrictions on contributions.<sup>14</sup>

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14. To the degree that the corporation’s major purpose becomes making or receiving contributions and expenditures, the corporation may be classified as a “political committee” under federal campaign finance law that is subject to contribution limits. However, it is not clear at the moment that even such a corporation would be limited in the amount of its own independent expenditures out of its treasury funds. Thanks to Allison Hayward for suggesting this footnote.

Aggregation through PACs and parties is quite inefficient by comparison. It is therefore difficult to understand why shareholders should be constitutionally entitled to this advantage. And it is also difficult to understand why speech by PACs and political parties, whose First Amendment credentials are at least as strong in this context as for-profit corporations, would receive less constitutional protection.

The justification, according to *Citizens United*, is doctrinal consistency with *Buckley v. Valeo*.<sup>15</sup> *Citizens United* strives for consistency with the original determination in *Buckley* that there is no government interest in limiting independent expenditures.<sup>16</sup> According to *Buckley*, independent expenditures present no risk of corruption, and therefore government regulation restricting independent expenditures is unconstitutional regardless of the funding source.<sup>17</sup> Of course, in *Austin v. Michigan Chamber of Commerce*, the Court engaged in doctrinal calisthenics to avoid this conclusion and upheld a prohibition on corporate expenditures.<sup>18</sup> *Citizens United* overruled *Austin* for this reason and mocked it as “not well reasoned.”<sup>19</sup> Although this criticism is understandable in certain respects, *Citizens United*’s confidence in the original correctness of *Buckley* is not. If *Austin* was not well reasoned, exactly the same can be said about *Buckley*.

*Buckley* is absurd as a matter of political reality in its constitutional assertion that contributions are potentially corrupting, but that independent expenditures are not at all.<sup>20</sup> *Citizens United* depends on this absurdity from *Buckley*, without any reservation about its unreality.<sup>21</sup> Notably, Justice Kennedy devoted only a single paragraph from his fifty-six-page majority opinion to dismissing the relevance of his recent majority opinion in *Caperton v. A.T. Massey Coal Co.*,<sup>22</sup> which recognized the corrupting potential of independent expenditures.<sup>23</sup> Of course, *Caperton* involved a different remedy than the government sought in *Citizens United*,<sup>24</sup> as Justice Kennedy notes, but both cases hinged on a critical judgment about the plausibility of corruption from independent expenditures. In *Caperton*, Kennedy’s answer was basically yes. Only a year later in *Citizens*

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15. See *Citizens United*, 130 S. Ct. at 913.

16. *Id.* at 902 (citing *Buckley v. Valeo*, 424 U.S. 1, 47-48 (1976)).

17. *Buckley*, 424 U.S. at 46, 51.

18. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 668-69 (1970), overruled by *Citizens United*, 130 S. Ct. 876.

19. *Citizens United*, 130 S. Ct. at 912.

20. See *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part); C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 47 (1998).

21. See *Citizens United*, 130 S. Ct. at 909 (concluding “that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”).

22. 129 S. Ct. 2252 (2009).

23. *Citizens United*, 130 S. Ct. at 910 (citing *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263-64 (2009)).

24. *Id.*

*United*, his answer was no. There are ways to distinguish the cases, but the summary dismissal of *Caperton* is utterly unconvincing. If the payoff from *Citizens United* is doctrinal consistency, there is no payoff at all.

The inconsistency between *Buckley* and *Austin*, now resolved by *Citizens United*, was a tension intrinsic to campaign finance law and not necessarily a failing in the actual practice of campaign finance law. Campaign finance law is a compromise in terms of both law and democratic values. It imperfectly expresses tension between abstract notions of liberty and equality. It expresses tension between unease about government restriction of speech on one hand and concern about the influence of economic power on the other hand. The need for campaign finance law to negotiate these tensions—with legal categories that do not fully capture their nuances—accounts for many logical failings of *Buckley*, *Austin*, and *McConnell v. FEC*<sup>25</sup> that are difficult to justify as consistent First Amendment doctrine.<sup>26</sup> However, campaign finance law as a whole, over the course of many cases, arguably sought pragmatic balance between these legal and democratic values. *Citizens United*, by contrast, charts a very different, more doctrinaire course.

Justice Kennedy and Chief Justice Roberts contended that the Court had no choice but to decide *Citizens United* on such broad grounds,<sup>27</sup> but the Court could have dispensed with *Citizens United* on many alternate, narrower grounds. Indeed, *Citizens United*'s legal challenges were focused overwhelmingly on just such narrower grounds. *Citizens United* had dropped its facial challenge to the constitutionality of the prohibition on corporate electioneering communications before the district court and did not try to raise it on appeal.<sup>28</sup> What is more, *Citizens United* did not even cite *Austin* in its jurisdictional statement and later raised the argument that *Austin* should be overruled only incidentally in its briefing on the merits.<sup>29</sup> The Court itself decided to focus on these broader questions and, on its own initiative, ordered rebriefing and reargument on them after initial oral argument.

It also is silly to argue that, in *Citizens United*, the Court had to lump together for-profit and non-profit corporations because of the facts of the case. This argument neglects the important insight that lumping together for-profit and non-profit corporations might have been the Court's decided intention. If the Court desired a narrower ruling limited to non-profits, it could have done so on cleaner facts in *FEC v. Wisconsin Right to Life*<sup>30</sup> or simply waited for a better case—one that did not involve a non-profit that received money from for-profit corporations. The Court's clear insistence on overruling *Austin* in *Citizens United*

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25. 540 U.S. 93 (2003), *overruled in part by Citizens United*, 130 S. Ct. 876..

26. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 667 (1997) (characterizing *Buckley* as an “attempt to solve an analogical crisis by splitting the difference”).

27. See *Citizens United*, 130 S. Ct. at 892; *id.* at 918-19 (Roberts, C.J., concurring).

28. *Id.* at 892 (majority opinion).

29. See *id.* at 932 (Stevens, J., dissenting).

30. 551 U.S. 449, 458-60 (2007).

may therefore be connected to the fact that doing so arguably required lumping together for-profits and non-profits. If that was the underlying judicial intention, it is only more reason to criticize the decision, not defend it.

## II. *CITIZENS UNITED*—LOOKING AHEAD

What does *Citizens United* signify for the future of campaign finance law? Although I have criticized *Citizens United*, another view of Justice Kennedy's majority opinion is that it represents only the first step of a comprehensive rethinking of campaign finance law. *Citizens United* may not make great sense only because the Court is not yet finished with what is a longer process that will extend over many decisions and years. In this part, I present Justice Kennedy's view of corruption as a touchstone for the Court's campaign finance jurisprudence going forward and then apply it to several key issues that courts will face over the next couple years. The ultimate result may be a transformation of campaign finance law under the Roberts Court.

### A. *Justice Kennedy and the Roberts Court*

Campaign finance law is an area of striking divergence by the Roberts Court from the jurisprudence of the Rehnquist Court that preceded it. The Rehnquist Court had become so deferential to the government on campaign finance regulation that Richard Hasen went so far as to call a series of its decisions the "New Deference Quartet."<sup>31</sup> In a line of cases that included *Austin* and *McConnell*, the Rehnquist Court consistently upheld campaign finance regulation under increasingly expansive conceptions of the government interest in preventing actual and apparent corruption. *Austin* upheld campaign finance regulation based on the prevention of a different form of corruption—a distortion of the political discourse from the corrosive effects of corporate money.<sup>32</sup> *McConnell* upheld provisions of the Bipartisan Campaign Reform Act (BCRA) based on the prevention of improper influence and opportunities for abuse that extended beyond the usual concern about quid pro quo arrangements.<sup>33</sup>

The Roberts Court, by contrast, has now struck down campaign finance regulation by 5-4 votes in a series of cases, only the most recent and most dramatic of which is *Citizens United*. The replacement of Chief Justice Rehnquist and Justice O'Connor with Chief Justice Roberts and Justice Alito produced a clear rightward shift in the Court's campaign finance decisions.<sup>34</sup> In

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31. Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 68 (2004).

32. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 668-69 (1990), *overruled by Citizens United*, 130 S. Ct. 876.

33. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 188-89 (2003), *overruled in part by Citizens United*, 130 S. Ct. 876.

34. See Daniel R. Ortiz, *The Difference Two Justices Make: FEC v. Wisconsin Right to Life, Inc. II and the Destabilization of Campaign Finance Regulation*, 1 ALB. GOV'T L. REV. 141, 142 (2008).

*Randall v. Sorrell*, the Court struck down contribution limits and expenditures in Vermont.<sup>35</sup> In *Wisconsin Right to Life, Inc. v. FEC*, the Court permitted an as-applied challenge to provisions of BCRA already upheld on a facial basis in *McConnell*.<sup>36</sup> Then, in *Wisconsin Right to Life II*, the Court held back from striking down those provisions outright by overruling *McConnell*, but the Court aggressively reinterpreted the holding of *McConnell* to limit the government's ability to regulate corporate and union campaign electioneering.<sup>37</sup> The Court effectively overruled critical provisions of *McConnell*, while denying that fact of the matter. By *Citizens United*, though, a 5-4 majority of the Court eagerly and explicitly acknowledged its overruling of *McConnell* and *Austin*.<sup>38</sup>

Justice Kennedy is the swing vote on the Roberts Court with regard to campaign finance and many other areas of law.<sup>39</sup> His views are quite likely to direct the Court's campaign finance decisions going forward from *Citizens United*, and it is for this reason that *Citizens United* appears to be a turning point for campaign finance law. Justice Kennedy's view on the government's constitutional interest in regulating campaign finance is quite clear—it is focused narrowly on the prevention of quid pro quo corruption. In *McConnell*, Justice Kennedy argued in dissent against the Court's attempt "to establish that the standard defining corruption is broader than conduct that presents a *quid pro quo* danger."<sup>40</sup> In Justice Kennedy's view, only actual or apparent quid pro quo corruption offers sufficient grounds for government regulation because it is the "single definition of corruption [that] has been found to identify political corruption successfully and to distinguish good political responsiveness from bad."<sup>41</sup> Justice Kennedy would therefore have struck down soft money prohibitions on parties who had no direct access themselves to the levers of government and could offer only access and influence to candidates and officeholders who would. The majority in *McConnell* rejected Justice Kennedy's "crabbed view of corruption" as ignorant of "the realities of political fundraising."<sup>42</sup> However, following the replacement of two Justices and the *Citizens United* decision, Justice Kennedy's position appears now to have prevailed on the Roberts Court.

Justice Kennedy's narrow view of corruption has profound implications that sweep across almost every aspect of campaign finance law. In *Citizens United*, Justice Kennedy cited his dissent from *McConnell* and declared assertively that

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35. *Randall v. Sorrell*, 548 U.S. 230, 262-63 (2006).

36. *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 546 U.S. 410, 412 (2006).

37. *Fed. Election Comm'n v. Wis. Right to Life, Inc.* 551 U.S. 449, 482 (2007).

38. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913-15 (2010) (overruling *Austin* and part of *McConnell*).

39. See Lee Epstein & Tonja Jacobi, *Super Median*, 61 STAN. L. REV. 37 (2008) (identifying Kennedy as the super median justice on the Roberts Court).

40. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 293 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled in part by Citizens United*, 130 S. Ct. 876.

41. *Id.* at 297.

42. *Id.* at 152 (majority opinion).

“[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”<sup>43</sup> The insufficient connection between the corporate and union prohibitions of 2 U.S.C. § 441b and the prevention of *quid pro quo* corruption were therefore grounds for unconstitutionality in *Citizens United*. But narrowing the government’s interest in preventing corruption has consequences that extend well beyond the regulations struck down in *Citizens United* because virtually all campaign finance regulation depends on this anti-corruption rationale for its constitutionality.

### B. Campaign Finance Law After *Citizens United*

Taken to its logical extreme, Justice Kennedy’s view of corruption may limit campaign finance restrictions to not much beyond the regulation of contributions to candidates and officeholders. Only candidates and officeholders possess access to government power that gives rise to the risk of a *quid pro quo* exchange. As Justice Kennedy argued in *McConnell*, “the corruption interest only justifies regulating candidates’ and officeholders’ receipt of what we can call the ‘*quids*’ in the *quid pro quo* formulation.”<sup>44</sup> In the absence of a contribution to a candidate or officeholder, the government’s interest in regulation might be similarly absent. As a result, under a robust application of this theory, there may be insufficient government interest in regulating contributions to political parties, political action committees, and interest groups when those funds are used only for independent expenditures. Even if the Court does not adopt the narrow view of corruption to this extreme, Justice Kennedy’s view from *Citizens United* will nonetheless have significant influence in many cases that bubble up from lower courts in the years to come.

1. *Contributions*.—As an initial matter, the basic logic of *Citizens United* might apply just as well to corporate contributions as to corporate independent expenditures. Of course, *Citizens United* dealt only with the federal prohibition on corporate expenditures, not the parallel prohibition on corporate contributions.<sup>45</sup> However, *Citizens United* makes clear that “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.”<sup>46</sup> Indeed, *Citizens United* emphasized the irrelevance of the corporate source of funds in the First Amendment analysis.<sup>47</sup> By extension, the corporate source of a contribution may be irrelevant as well. Although contribution limits might apply to corporate contributions just as they do to individual or committee contributions, it might be difficult to justify a flat discriminatory prohibition on corporate contributions, as a constitutional matter,

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43. *Citizens United*, 130 S. Ct. at 909.

44. *McConnell*, 540 U.S. at 293 (2003) (Kennedy, J., concurring in part and dissenting in part).

45. *Citizens United*, 130 S. Ct. 886.

46. *Id.* at 903.

47. *Id.* at 904.



under the broad language and logic of *Citizens United*.<sup>48</sup>

Even more intriguing are the implications of *Citizens United*'s deeper reasoning for the regulation of contributions as a general matter, whatever their source. The reasoning of *Citizens United* placed great weight on the premises that (1) only contributions to candidates and officeholders pose a threat of quid pro quo corruption; and (2) independent expenditures do not pose that risk.<sup>49</sup> Under this logic, the Court may be skeptical about a risk of quid pro quo corruption inherent in a contribution to someone other than a candidate or officeholder, at least when those funds are not later used to make a contribution to a candidate or officeholder. Put another way, contributions to a non-connected political committee that uses those funds to make only independent expenditures may pose no more threat of quid pro quo corruption than independent expenditures by the initial contributor herself. Neither the independent expenditure, nor the contribution to fund another's independent expenditure, would involve a contribution directly to a candidate or officeholder, and therefore neither scenario would pose the risk of quid pro quo corruption constitutionally necessary for government regulation.

This extension of *Citizens United* was pivotal in a case recently decided by the District of Columbia Circuit involving just such facts. In *SpeechNow.org v. Federal Election Commission*, the D.C. Circuit considered the constitutionality of contribution limits as applied to a non-connected 527 organization that received contributions solely for the purpose of making independent expenditures.<sup>50</sup> The use of contributions to make expenditures had routinely been sufficient for decades under the Federal Election Campaign Act (FECA) and *Buckley* to justify government application of federal campaign restrictions—most importantly, contribution limits—to organizations like SpeechNow. However, SpeechNow did not make contributions to candidates, and thus, following *Citizens United*, it arguably posed no direct risk of quid pro quo corruption in its activities.<sup>51</sup> Under this logic, the D.C. Circuit struck down contribution limits and other restrictions as applied to such groups.<sup>52</sup>

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48. In *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003), the Court upheld a federal prohibition on contributions as they apply to MCFL nonprofit corporations, even though such corporations were constitutionally exempt from the federal prohibition on corporate independent expenditures. *Id.* at 163. However, *Beaumont* was decided before *Citizens United* and relied instead on precedent much more suspicious of corporate influence on the political process than *Citizens United*.

49. *Citizens United*, 130 S. Ct. at 908.

50. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 689 (D.C. Cir. 2010), *petition for cert. filed*; see also *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 699 (9th Cir. 2010) (striking down as unconstitutional limits on expenditures by persons who have received contributions), *petition for cert. filed*; *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 291-93 (4th Cir. 2008) (declaring unconstitutional a state contribution limit as applied to a committee making only independent expenditures).

51. *SpeechNow.org*, 599 F.3d at 696.

52. *Id.*

I argued earlier that *Citizens United* allows for-profit corporations to be more efficient aggregators of campaign funds, mainly because they effectively aggregate without being subject to contribution limits. However, the decision by the D.C. Circuit extending the reasoning of *Citizens United* to SpeechNow allows similar non-connected groups to aggregate without restriction by contribution limits.<sup>53</sup> In other words, *Citizens United* may have advantaged corporations vis-à-vis other types of collective organizations only momentarily until the FEC or courts extend the decision's larger logic to all groups that do not engage in contributions to candidates and officeholders.

2. *Soft Money*.—After *Citizens United*, the unconstitutionality of campaign finance regulation is even clearer for restrictions on money used for purposes other than express campaign speech. *Buckley* limited the constitutionally permissible scope of government regulation to what it called “explicit words of advocacy,” or communications that expressly advocate the election or defeat of a clearly identified candidate for federal office.<sup>54</sup> Campaign money donated to a recipient other than a candidate for office to fund political activities besides express advocacy is called “soft money.”<sup>55</sup> These funds cover a variety of activities ranging from administrative expenses to voter registration drives to “issue advocacy” that stops short of expressly advocating the election or defeat of a particular candidate.<sup>56</sup> Following *Citizens United*, the Court appears poised to roll back regulations restricting soft money.

Soft money does not involve a contribution to a candidate or even fund what the Court considers actual campaign speech in the form of express advocacy. For this reason, soft money is a further step removed from the threat of corruption than contributions to fund independent expenditures, at least under Justice Kennedy's conception of corruption. Although the Court in *McConnell* permitted government regulation of the receipt and use of soft money by the national parties, *Citizens United* presaged a change in direction, having already overruled part of *McConnell*.<sup>57</sup>

The D.C. Circuit has already begun striking down certain federal regulations concerning the use of soft money by non-connected committees. In *Emily's List v. FEC*, the D.C. Circuit held that the government could not restrict the use of soft money by non-connected committees to the extent that soft money was used exclusively for purposes other than express advocacy.<sup>58</sup> The FEC had previously attempted to require non-connected committees to fund their administrative expenses, voter drives, and issue advocacy in part with “hard money” collected

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53. See FEC Advisory Opinion 2010-09 (July 22, 2010) (allowing a corporation that intends to make only independent expenditures to accept unlimited contributions from individuals for that purpose).

54. *Buckley v. Valeo*, 424 U.S. 1, 43 (1976).

55. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 122-23 (2003), *overruled in part by Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

56. *Id.* at 123-24.

57. See *Citizens United*, 130 S. Ct. at 913.

58. *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 25 (D.C. Cir. 2009).

subject to federal contribution limits, source restrictions, and disclosure requirements.<sup>59</sup>

The Supreme Court temporarily stayed its hand at a greater opportunity to strike down federal regulation of soft money as received by political parties in *Republican National Committee v. Federal Election Commission*.<sup>60</sup> In that case, the Republican National Committee challenged prohibitions on the national parties' receipt and use of soft money that was previously upheld in *McConnell*.<sup>61</sup> The U.S. District Court for the District of Columbia upheld these prohibitions again, citing *McConnell* as precedent.<sup>62</sup> The Court's earlier decision in *McConnell*, though, was based in part on a broader view of corruption that Justice Kennedy's opinion in *Citizens United* appears to reject in large part. Now, following *Citizens United*, Justice Kennedy's dissenting views on party soft money in *McConnell* may eventually carry the day with a majority of the Court, but in *RNC v. FEC*, the Court declined to note probable jurisdiction and summarily affirmed the lower court. The facial challenge to the soft money prohibition was not squarely presented in the case, which was framed as an as-applied challenge by the RNC. It is not difficult to imagine this Court striking down the soft money prohibitions if squarely presented with the question, along with full briefing for a facial challenge.

3. *Disclosure*.—The Court has always been more deferential toward campaign finance disclosure requirements than it has been toward outright limits on expenditures, contributions, and soft money. Although the Court struck down the prohibition on corporate independent expenditures in *Citizens United*, the Court upheld federal disclaimer and disclosure provisions requiring corporations to disclose their sponsorship of campaign speech.<sup>63</sup> These provisions, the Court explained, may burden speech to a degree, but they “impose no ceiling on campaign-related activities” or block speech.<sup>64</sup>

The Court's recent decision in *Doe v. Reed* generally signals that even the Roberts Court remains deferential to government compelled campaign disclosure. The Ninth Circuit had upheld the state-required disclosure of signed petitions to qualify a ballot measure that would have repudiated a new state law extending marriage benefits to domestic partners.<sup>65</sup> In *Doe*, the group Protect Marriage Washington argued that public disclosure of signed petitions would subject the signatories to harassment by the ballot measure's opponents,<sup>66</sup> along the same lines as harassment faced by supporters of Proposition 8 in California a couple years ago. Over Justice Thomas's dissent, the Court in *Citizens United* dismissed

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59. *Id.* at 4-5.

60. 698 F. Supp. 2d 150 (D.D.C.), *aff'd*, 130 S. Ct. 3544 (2010).

61. *Id.* at 153.

62. *Id.* at 162-63.

63. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913-14 (2010).

64. *Id.* at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)).

65. *Doe v. Reed*, 586 F.3d 671, 674, 681 (9th Cir. 2009), *aff'd*, 130 S. Ct. 2811 (2010).

66. *Id.* at 676.

a similar risk of harassment as it applied across the board to corporations.<sup>67</sup> Likewise, in *Doe v. Reed*, the Court rejected a facial challenge to Washington's disclosure requirements, finding that the speculative risk of harassment was minor in the case.<sup>68</sup> However, the Court again left open the possibility of as-applied exceptions to prohibit disclosure if it judges the risk of harassment to be significant.

#### CONCLUSION

*Citizens United* marks an important turning point in campaign finance law. Under the Rehnquist Court, the government won nearly every major campaign finance case for more than a decade through *McConnell v. FEC* in 2003. However, since Chief Justice Rehnquist's retirement, a 5-4 majority of the current Roberts Court has decided a series of significant campaign finance cases against the government. *Citizens United* signals the direction of the Roberts Court toward a larger rollback of campaign finance regulation.

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67. *Citizens United*, 130 S. Ct. at 980-82 (Thomas, J., concurring in part and dissenting in part) (describing the harassment of supporters of Proposition 8).

68. *Reed*, 586 F.3d at 680-81.